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SUPREME COURT OF THE UNITED STATES.

[redacted]

OCTOBER TERM, A. D. 1927.

[redacted]

MISSOURI PACIFIC RAILROAD COMPANY,

Petitioner,

vs.

MARY L. AEBY,

Respondent.

No. 186.

[redacted]

On Writ of Certiorari to the Supreme Court of the State of Missouri.

[redacted]

BRIEF AND ARGUMENT FOR RESPONDENT.

[redacted]

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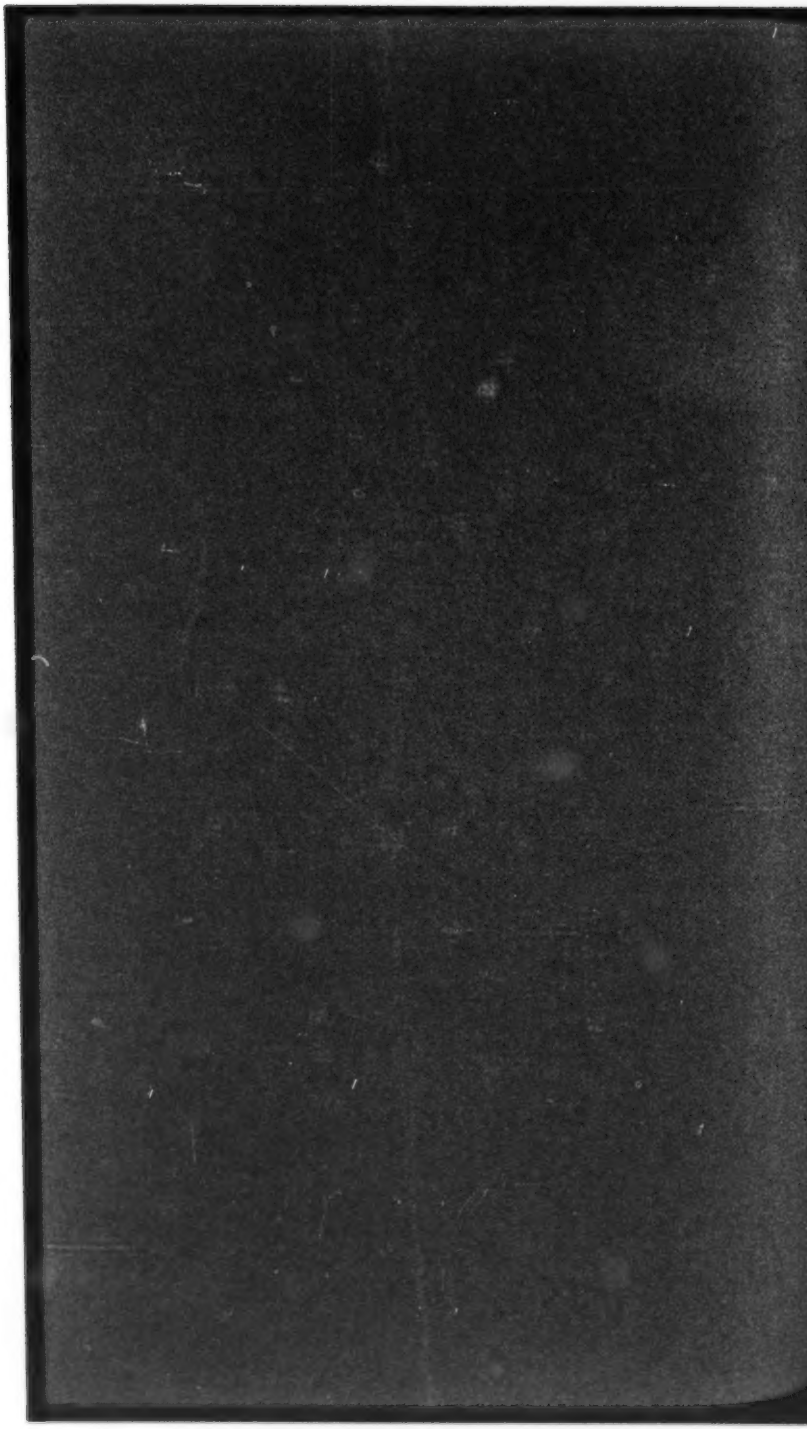

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1927.

MISSOURI PACIFIC RAILROAD COMPANY, Petitioner,		
vs.		No. 100.
MARY I. AEBY, Respondent.		

On Writ of Certiorari to the Supreme Court of the State of Missouri.

BRIEF AND ARGUMENT FOR RESPONDENT.

I.

In the concurrent findings of the Circuit and Supreme Courts there is an absence of clear and palpable error.

This is an action by a servant against the master under the Employers' Liability Act. This Court is asked to disturb the findings of the State Circuit Court and the Supreme Court of Missouri upon the alleged insufficiency of

the evidence concerning the assumption of risk and negligence. The facts are fully stated in the opinion delivered by the Supreme Court of Missouri (313 Mo. 492), and appended to the record. (See Record, p. 118.) In a general way, the facts are stated and summarized in the brief filed in this court by the plaintiff in error. Reference will be made to the pertinent facts in connection with our argument on the points raised by plaintiff in error. In this record there is, in our judgment, a total absence of such clear and palpable error as would justify this Court in disturbing the ruling made by the Supreme Court of Missouri (**B. & O. R. R. Co. v. Whitacre, 242 U. S. 169**). Our insistence is that there is no error, not even the slightest, in the decision delivered in the state court.

The facts in this record are substantially similar to the facts in the case of **Great Northern Ry. Co. v. Knapp, 240 U. S. 464**, and that case was disposed of by this Court, using the following language (l. c. 466):

> "It was conceded that when the injury was received plaintiff was engaged in work pertaining to the defendant's business as a common carrier in interstate commerce, and that the Federal Act applied. The Court recognized that, if assumption of risk by the plaintiff was made out, it would bar recovery under the act (Seaboard Air Line Railway v. Horton, 233 U. S. 492). The Court charged the jury accordingly, and there was no exception by the defendant to the

charge, or request on its part for any additional instructions, the defendant contenting itself with its motion for dismissal or for a direction of a verdict in its favor. The case, then, is one in which there is no question as to the interpretation of any provision of the Federal Act, or as to the definition of legal principle in its application, but simply involves an appreciation of all the facts and admissible inferences in the particular case for the purpose of determining whether there were matters for the consideration of the jury. The state courts, trial and appellate, held that there were. Having regard to the appropriate exercise of the jurisdiction of this Court, we should not disturb the decision upon a question of this sort unless error is palpable. The present case is not of this exceptional character."

The application of the above doctrine should result in the affirmance of the decision of the Supreme Court of Missouri. However, we will respond to the points argued in the brief filed by plaintiff in error.

II.

The defendant, by its answer, admitted all facts necessary to bring this case under the Federal Employers' Liability Act.

The first point relied upon by the defendant is that plaintiff's case is not one under the Employers' Liability Act. This point is not well taken, because plaintiff, by its answer, admitted a state of facts which brings the

case directly within said act. In the answer filed by defendant the following admissions appear (R. 5, 6, 7).

> "Defendant admits that at all the times mentioned in said petition defendant was engaged in commerce between different states of the United States, to wit, between the State of Arkansas and the State of Missouri, and at all such times, as well as at the time of her alleged injury, the plaintiff was employed by defendant in interstate commerce, to wit, as a station agent at Magness, in the State of Arkansas, located on defendant's line of railroad between the City of Newport in said State of Arkansas and the City of Joplin in the State of Missouri, and defendant further admits that the particular train mentioned in plaintiff's petition, to which plaintiff was required to deliver and from which she was required to receive, express, mail and messages, was a train which was operated, and carried passengers and merchandise, between said City of Newport, Arkansas, and said City of Joplin, Missouri" (pp. 5-6).
>
> . . . . . .
>
> "Further answering said amended petition, defendant states that at all the times mentioned in said petition defendant was engaged in commerce between the different states of the United States, as alleged in said petition, and as admitted herein, and that at all such times, as well as at the time of her alleged injury, plaintiff was employed by defendant in interstate commerce, and defendant further states that all of the conditions existing at said station and in and upon said station platform, with respect to either light or the lack of light, to the alleged depression or ditch

in said platform, and the alleged slant of the sides thereof (fol. 15), and with respect to the snow, sleet or ice, if any, therein, as well as whatever dangers, if any, existed as the result of such alleged conditions, were all open and obvious to anyone, and especially to plaintiff, while passing over said platform, and were either known to and appreciated by the plaintiff, or by the exercise of ordinary care on her part could have been known and appreciated by her, and defendant further states that plaintiff assumed all risks of injury incidental thereto or likely to result therefrom while passing over said platform, for which reason plaintiff is not entitled to recover against defendant" (p. 7).

In view of the above admissions showing that in this case defendant relied upon the federal act, set it up and claimed rights under it and never gave the trial court an opportunity to pass upon the claim now presented, we contend the Supreme Court correctly decided such point, and such ruling is in entire accord with the decisions of this Court and the state statutes and established practice in Missouri.

Missouri Pacific R. R. Co. v. Tabor, Guardian of Small, 244 U. S. 200;
Allen v. Missouri Pac. Ry. Co. (Mo. Sup.), 294 S. W. 80, April 11, 1927.

The defendant, however, assumed the position aforesaid in the lower court and there undertook to maintain that

position. It cannot thereafter, because its interests may have changed, assume a contrary position to the prejudice of the plaintiff, who acquiesced in the position then taken by defendant in the state court.

Davis v. Wakelee, 156 U. S. 680, 691;
Daniels v. Tearney, 102 U. S. 415, 421;
Railway Co. v. McCarthy, 96 U. S. 258, 267.

In accordance with the doctrine above stated, and illustrative of same, this Court in an early day held that where the counsel admit in the aggregate the sums reported by the Referee to whom the question of the amount of damages sustained by the sinking of a coal barge was referred, even though that was only with the intention to give the Supreme Court jurisdiction, the sums so reported by the Referee cannot be reduced in the Supreme Court by denying it in detail for the purpose of taking away the jurisdiction of that court.

Chapman v. Forsyth, 2 How. 202, 209, 11 L. Ed. 236.

The defendant, by its instruction No. 3 (Rec., p. 108), requested the Court to instruct the jury, and the Court did instruct the jury that, under the facts set forth in defendant's answer, both defendant and plaintiff were at said time engaged in interstate commerce.

After asking said instruction and after inducing the Court to give it, the Court, at the request of the defend

ant, gave to the jury instruction No. 5 (Rec., p. 109), by which the amount of plaintiff's recovery was diminished in proportion to the way the jury might believe the plaintiff failed to exercise ordinary care for her own safety.

This is a doctrine created by the federal statutes and in direct conflict with the state law, and it is plain that defendant in the trial court attempted to cut down the amount of plaintiff's recovery by invoking the federal statute, and having tried the case on that theory it is intolerable to permit the defendant to change theory and change front in this court.

The allegations of plaintiff's petition are sufficient to state a case under the Federal Employers' Liability Act, and while it is true that the defendant filed a general demurrer at the close of all the testimony, such demurrer did not and could not present an issue as to whether or not the action was under the state law or the federal law, for the reason that defendant by its answer voluntarily conceded and admitted that the cause of action stated in plaintiff's petition was one arising under the federal act.

Mere matters of error may always be waived, and they are waived when the attention of the Court is not called to them.

Montana R. Co. v. Warren, 137 U. S. 348, 351.

A party cannot be permitted to complain in an appel-

late court of the action of the court below, had in compliance with his request.

United States v. Memphis, 97 U. S. 284;
New York Elevated R. Co. v. Fifth Nat. Bank, 135 U. S. 432;
Waterworks Co. v. Barret, 103 U. S. 516;
New York etc. R. Co. v. Estill, 147 U. S. 591;
Cavender v. Cavender, 114 U. S. 464, 471;
Randon v. Toby, 11 How. 493;
U. S. v. St. Louis etc. Transp. Co., 184 U. S. 247, 249;
Baggs v. Martin, 179 U. S. 206, 208;
Gableman v. Peoria etc. R. Co., 179 U. S. 335, 342.

In this case the plaintiff voluntarily invoked the Federal Employers' Liability Act, and it is in the same situation of a plaintiff, who has voluntarily invoked the equity jurisdiction of the Court, and is not in a position to urge, on appeal, that his complaint should have been dismissed because of the adequacy of the remedy at law. And, likewise, a defendant, who answers and submits to the jurisdiction of the Court, and enters into his defense at large, is precluded from raising such an objection on appeal for the first time.

Reynes v. Dumont, 130 U. S. 354, 395;
Kilbourn v. Sunderland, 130 U. S. 505;
Brown v. Lake Superior Iron Co., 134 U. S. 530, 536;
Perego v. Dodge, 163 U. S. 160, 164;
Cowley v. Northern Pac. R. Co., 159 U. S. 569.

Plaintiff's petition charges that the defendant was "guilty of negligence" and then sets forth the acts of omission and commission constituting negligence. The corporation could act only through its officers and agents and hence the petition charges negligence against the officers and agents of the defendant and avers that said negligence created an unsafe condition, to wit, the ditch and depression in the depot platform. It appears to us that said allegation presents a cause of action under either subdivision of the federal act. But be that as it may, the defendant led the trial court to adopt the theory that the case was one under the federal act and by so doing defendant assumed that the word "works" was sufficiently comprehensive to embrace, under the facts in this case, the depot platform. Such being the theory of the defendant, it is bound by it, bound by its pleadings, bound by its instructions, bound by its own construction and cannot urge error even though generally the word "works" is not comprehensive enough to embrace a depot platform.

But in its brief defendant says that the federal act does not apply because after the plaintiff had completed the act of placing the truck at the edge of this platform she was injured while leisurely walking across the platform upon a mission purely for her own convenience (Brief, p. 24), and contends that plaintiff had no further duty to perform until the train arrived, and to avoid the cold weather "she chose to return to the station to there await the arrival of the train, all for her

own convenience" (Rec., pp. 38 and 39), and the defendant further contends that "she was not in the performance of any duty for petitioner at the time of her injury (Brief, p. 33), and at the moment of her injury plaintiff was not engaged in the performance of any duty for petitioner and plaintiff in error says, "For which reason, and for other reasons herein referred to, we contend that the case is not brought within the provisions of the Federal Employers' Liability Act by the facts proved (Brief, p. 22).

This is a palpably unsound doctrine. Her duty required her to take the truck out and her duty also required her to return to the station, and it seems utterly indefensible to contend that when this lady was **returning** to the depot from the doing of one act for her master that she lost momentarily the status of an employe when her act in returning was in futherance of the master's business, viz., placing herself in the depot so she could receive or send messages, sell tickets or otherwise discharge her duties to her employer.

The federal act is the exclusive standard for measuring plaintiff's rights and when it stands admitted that both plaintiff and defendant are engaged in interstate commerce any negligence proved gives plaintiff a right of recovery otherwise a plaintiff could recover under neither the state nor federal laws.

An employe engaged at the time of his or her injuries in receiving and delivering express and mail to and from

an interstate train on a depot platform is engaged in work which is so closely connected with the interstate commerce in which the employer railroad is engaged as to be a part of it.

Pedersen v. D. L. & W. R. Co., 229 U. S. 145;
Roberts, Federal Liability of Carriers, Vol. I, Sec. 457;
Erie R. R. Co. v. Szary, 259 Fed. 181;
Erie R. R. Co. v. Collins, 253 U. S. 81;
Phila. etc. Co. v. Smith, 250 U. S. 103;
Southern Pac. R. Co. v. Payne, 251 U. S. 259;
Southern R. R. v. Puckett, 249 U. S. 573;
Coke & Coal Co. v. Deal, 231 Fed. 604.

This suit was originally brought by plaintiff by the filing of a petition designed to set forth a cause of action for damages at common law. Shortly before the trial of the case defendant filed an amended answer alleging that it was engaged, and respondent was employed, in interstate commerce, and setting up the defense of assumption of risk under the federal statute. Plaintiff was thus placed in the position of being compelled to elect to proceed either at common law or under the federal act. After a careful consideration of the language of the Supreme Court of Missouri in the case of **Elliott v. Payne, 293 Mo. 581**, plaintiff decided that the federal act was applicable, and still contends that it is applicable.

That Court said (Elliott v. Payne, 293 Mo., l. c. 594):

> "It is evidently to these places to which the word 'works' applies. It certainly does not apply to a depot platform, **except so far as such platform may be used by the particular employe as a working place.** The working place of an engineer or fireman is not on a depot platform. A switchman may have his working place in the yards, and other employes have theirs in shops and other working places along the line. But it is evident that a depot platform is not a working place for an engine fireman, and therefore not within the term 'works' as used in the statute."

Again, on the same page:

> "**In a very limited sense it may be a working place for certain classes of employes. Those employes whose duties require them to unload passengers, baggage or freight might say that it was a working place,** but to other employes it would be a mere way of ingress and egress. **Deceased was not in an employment which required him to use the platform as a working place.**"

In **Dietzman v. Screw Company, 300 Mo.,** l. c. 209, a still later case, that Court said:

> "Defendant recognized this **platform** as a place from which repairs were to be made by keeping thereon the short ladder for use in making the repairs. **It thereby became a place of work for deceased,** because it stands admitted that it was his

duty to make the repairs. It was the duty of defendant to use ordinary care to have this working place reasonably safe for the performance of the work there to be done."

Again, on the same page:

"Under the evidence, the short ladder was kept upon this platform for the purpose of repair work which was to be done from the platform. **This PLATFORM was used** (among other uses) **as a place from which to repair the chutes**, butterfly valve and other things between it and the upper platform, ten or twelve feet above it. **For this purpose it was a PLACE OF WORK**, and it was defendant's duty to have exercised ordinary care to have such place reasonably safe for the performance of such work as was to be done therefrom."

Plaintiff's amended petition alleges that it was her duty as station agent to go from the station to the trains for the purpose of receiving and delivering express, mail and messages, and that in so doing she was required to pass over the platform alleged in the petition to be defective. This clearly brought the case within the proviso contained in the opinion in Elliott v. Payne. To this amended petition appellant filed the answer aforesaid, admitting that appellant was engaged, and respondent engaged, in interstate commerce and admitting that

"the particular train mentioned in plaintiff's petition **to which plaintiff was REQUIRED to deliver and**

from which she was REQUIRED to receive express, mail and messages"

was an interstate commerce train.

III.

Under the evidence in this case the state trial court and the Supreme Court of Missouri correctly ruled that plaintiff did not, as a matter of law, assume the risk.

The Supreme Court of Missouri followed and applied the federal rule as to assumption of risk; hence the solution of this question depends upon the facts proved. They are in substance as follows:

The depot of defendant faces north (R. 12). The door to the station is at the west end. The depot platform was constructed of chat, and "chat" was defined as small gravel and crushed up rocks. Some of the pieces of chat were as big as a half dollar (R. 13). The platform was something like a cinder path (R. 13). The platform would absorb water (R. 15) and the ditch or drain would carry it away (R. 28-38). The chat was loose, so that the water could soak down and in (R. 37). The platform extended from the station to the tracks (R. 13), a distance of about ten feet (R. 45). The said platform was not level, but sloped downward from the track to the depot (R. 13), and then the drain sloped towards the west end of the depot (R. 52-56). Two steps led down from the depot to the platform (R. 13). There was a drain or ditch in front of

the steps (R. 13). It extended along the entire north line of the depot building (R. 56). The bottom of this drain was twelve inches lower than the highest part of the platform (R. 13), and water falling on the platform flowed towards the drain or ditch. The drain proper was about four inches lower than the platform immediately adjacent to it (R. 13). In other words, the ditch had "banks" about four inches high. There was a wide place in the drain immediately in front of the depot door, said wide place being about four by five feet (R. 13). This wide place or depression was caused by wear, resulting from persons passing in and out of the depot and by the action of the water flowing from the depot roof and the sloping platform (R. 13). This wide place or depression had a rough, uneven surface (R. 17-61), and on the night of plaintiff's injury these rough, uneven places were covered with ice and snow (R. 39-40). The entire depression was covered with ice (under snow) immediately in front of the depot steps (R. 43). Plaintiff commenced to work for defendant in July, 1920, and the ditch or depression was in the platform at that time, but was not so deep and well defined as it was in January following (R. 53). It was constantly wearing wider, longer and deeper (R. 56). It would wear deeper when more rain fell (R. 56), and by the travel of passengers. The rain which fell the night of the accident washed the ditch deeper (R. 56).

The plaintiff slept in the depot. She waited upon the evening train some time between 6:41 and 9 p. m. on Jan-

uary 12th and did not leave the depot until the following morning at 6:10, when the accident happened (R. 15). The weather was cloudy (R. 29), not stormy, when she waited on the train on the evening of the 12th (R. 15), but later that night she noticed that it was raining (R. 15). She retired for the night without obtaining any further knowledge of the weather and awoke about 6 a. m. on the next day (R. 15) and went out on the platform and placed a truck in position to receive mail and express from a train due at that station at 6:18 a. m. It was 6:10 when plaintiff went out (R. 15). The platform was covered with about three inches of snow (R. 15). She noticed ice on the truck (R. 32, 43), but placed the truck in its proper position, and she did not slip or slide (R. 39) while engaged in this work. The ice was not on the platform when plaintiff and her companion went to bed that night (R. 88).

The plaintiff, describing her return to the depot and the accident, testified:

> "I caught my foot upon rough ice. I got caught on those rough pieces. The ice was all covered with snow. As I came along this trench, or ditch, or drain, I stepped on that and my foot slipped—slipped on the ice that formed there during the night before. I was then walking south towards the station. When I walked across that platform I felt places raised along the ice in front of the door—just in front of the door. These raised places were only in the ditch. The ice

in the wide place in the ditch in front of the doorway was about three or four feet long and directly in front of the steps. Yes, sir; I know I tripped on something rough in this place (R. 37). It was snowing at the time I put the truck out there (R. 40). I had an oil lamp in the ticket office. It was on the stand that we moved around. That was the only way of lighting this depot. I knew before I started back after placing this truck that it had sleeted and frozen, but I did not notice anything unusual (R. 44). I did not know the ice was before the door. I knew it had sleeted and snowed, but I did not know the ice was before the door. I did not know there was ice in this depression. I did not know that ice had formed elsewhere. I did not notice anything unusual. I knew ice had formed on the truck and knew it had been cold enough to freeze (R. 44). I knew if one steps on ice you are liable to slip, but I did not know there was ice there. I did not know it at that time. When I went out on this platform it was very dark. You might see a person maybe ten feet from you. You could not see across the platform from north to south. It was dark and the sky was all cloudy and I found it had sleeted and snowed. I observed rains before that on the platform. I had observed that water was running before the door and that the platform would absorb water (R. 15). In going out that morning I stepped off the west end of the steps going west. When I went out to get the truck I did not notice anything in connection with the station in front of those steps. I returned to the depot coming practically from the north (R. 16). I did not observe the condition of this depression before I fell. I did ob-

serve it after I fell. It was covered with snow and ice. The surface was rough and uneven. I fell in this drain or depression. Yes, I remember how I slipped there—was first thrown backwards and then forwards into the ditch" (R. 17).

The Supreme Court of Missouri quotes from the Horton case, 233 U. S. 492, and gives it full force and effect, and measuring plaintiff's rights by said rule says that under said testimony

> "plaintiff did not know or apprehend there was ice in the depression under the snow, nor did she appreciate the danger of stepping thereon,"

and, therefore, correctly decided that plaintiff did not assume the risk.

In **Seaboard Air Line Ry. Co. v. Horton, 233 U. S. 492,** this Court said:

> "But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employe is not treated as assuming until he becomes aware of the defect of disrepair and of the risk arising from it, unless the defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them."

The Supreme Court of Missouri quotes the above language from the Horton case, follows it, and applying the rules of law therein contained holds that under the evidence in this case plaintiff did not assume the risk. We submit that the conclusion of the Supreme Court of Missouri is the only permissible conclusion under the facts in this case.

The facts constituting negligence in the case at bar are entirely different from the facts upon which the cases cited by plaintiff in error turned. In the case at bar the conditions from which negligence arises were not fixed or permanent. The ditch or drain was subject to continual change and was enlarged, deepened and changed by the action of the rain which fell during the night. The dangerous features resulted in part from the formation of ice on an irregular surface and this ice and irregularity were effectively concealed by two or three inches of snow. The water falling on the platform was generally absorbed by sinking into the porous chat platform or ran off through the channel leading to the west end of the depot and beyond. Plaintiff did not know that water had accumulated in the wide part of the ditch, did not know that the ditch was rough and uneven on its sides and bottom, did not know that there was anything there to "trip" her or cause her to fall.

Counsel for plaintiff in error in the last analysis asks this Court to hold that plaintiff assumed the risk because

she **should** have known that there was ice in the depression. Learned counsel say:

> "It is not imposing too great a burden upon respondent for the law to say that she **should**, in the exercise of that reasonable care which the law demands of all persons, have known that there was ice in this depression" (Brief, p. 52).

The plaintiff, by direct inference, concedes that if that premise does not exist, then there is no assumption of risk in this case as a matter of law.

The doctrine that plaintiff "should by care have known," etc., cannot be sustained for: (a) Plaintiff did not know how much rain had fallen; (b) she did not know whether all the rain that had fallen had been absorbed by the porous platform; (c) she did not know that all the rain which had fallen had not run off through the ditch leading to the west end of the depot; (d) from noticing ice on the parts of the truck she could not know whether the rain had fallen before or after the snow—nor could she tell how heavily it had rained; (e) she had no knowledge as to when the rain commenced, how long it lasted, or when it ceased, and, therefore, did not know that sufficient time had not elapsed for all the water in the depression to be absorbed or carried off before it froze into solid ice; (f) the hour was dark and the ice was covered by a three-inch coating of snow—which snow covered the depression

or ditch and concealed the uneven sides and irregular bottom.

Her duties required her to pass over this negligently constructed ditch early in the morning, while it was yet dark, and shortly after the fall of rain and snow. When she last saw the ditch or depression on the evening before it was dry and no snow or ice upon it, and it was no part of her duty to inspect it or keep it in a safe condition. The platform was negligently constructed of improper material, and the defendant company was bound to know a platform built of such material (evidently shoveled in loose) would by use create an irregular surface containing ditches and depressions likely to produce injury to persons using it when covered with sleet and snow, but such conditions were not obvious to plaintiff at the time she was injured, and it not being obvious she neither assumed the risk nor was she guilty of contributory negligence, and the Supreme Court of Missouri followed the doctrines of this Court in so holding.

The answer of defendant, after averring that all the defects and imperfections in the platform were open and obvious to anyone while passing over the platform, then concludes by using this language relating to said defective conditions:

> "* * * were either known to and appreciated by the plaintiff or, by the exercise of ordinary care on her part, could have been known and appreciated by her."

Therefore it appears from said answer that defendant has not properly pleaded the defense of assumption of risk, the answer averring in substance that the defects were obvious **only** to anyone who would exercise ordinary care to search for them. Such, of course, is not the law as declared by this Court, and the language of the Supreme Court of Missouri criticized by plaintiff in error is not subject to criticism. The Court was responding to and combating this theory of "ability by care to discover" the Master's negligence contained in the answer, namely, that a servant assumes the risk if he could, by exercising ordinary care, discover the master's negligence and the danger likely to follow therefrom. The Supreme Court of Missouri referred to the state rule that "the servant never assumes a risk of injury created by negligence," and used almost the identical language used by Justice Fuller in the O'Brien case (161 U. S., l. c. 452), to wit: "He does not take the risks of the negligence of the master itself." The language used by the Supreme Court of Missouri was by way of illustration or argument in opposition to the "ordinary care" doctrine set forth in defendant's answer. However, it is manifest that the Supreme Court of Missouri did not decide this case upon the Missouri theory, but did decide it in strict accordance with the theory as announced by the Court in the **Horton case**, supra, and other cases following it.

This case is not ruled by the class of cases cited by the plaintiff in error. The principles applicable to the facts

in this case, relating to assumed risk, are contained in another line of cases dealing with facts analogous or similar in legal effect to the facts proved in the case at bar. We refer to a few of such cases, and they are as follows:

In Union Pacific Railway Co. v. O'Brien, 161 U. S., l. c. 452, the evidence tended to show that an engineer was bringing a freight train from Como, Colorado, to Denver; that the engineer left Como at 8 o'clock on the evening of September 3, 1890, and that the accident occurred at 1 o'clock in the morning of September 4; that the line of railway followed the course of the South Platte River, and that there were numerous cuts thereon, caused by the intersection of the line with the spurs projecting from the foothills of the mountains, along which the line was built; that the locomotive was derailed by reason of sand and gravel, which had been deposited on the track to a depth of some seven or eight inches and to the extent of from ten to twenty feet; that this deposit was in a cut, approached by a curve to the left and then curving to the right as the track entered the cut—a double curve; that the river bank of the cut was about seven or eight feet high, the other bank being much higher and very steep, sloping back up the mountainside; that down the upper bank ran a narrow gully, which, in rainy weather, brought down water, carrying sand and disintegrated rock; that this gully had had an outlet into the river before the track was constructed across it; that there was no opening or culvert under the railroad track through which the

water and material brought down could escape; that a small ditch ran alongside the roadbed, but if the water coming down was greater in quantity than this ditch could carry, then the surplus would run over and upon the tracks of the railroad; and that rain had fallen the evening previous to the accident, and the water rushing down the gully had deposited this mass of sand and gravel upon the track. Upon this state of fact the railroad contended that the engineer assumed the risk, but this Court ruled otherwise, and said:

> "The servant undertakes the risk of the employment as far as they spring from defects incident to the service, but he does not take the risks of the negligence of the master itself. The master is not to be held as guaranteeing or warranting absolute safety under all circumstances, but it is bound to exercise the care which the exigency reasonably demands in furnishing proper roadbed, track and other structures, including sufficient culverts for the escape of water collected and assimilated by its embankments and excavations" (161 U. S. 457).
>
> "There are cases in which, if the employe knows of the risk and the danger attendant upon it, he may be held to have taken the hazard by accepting or continuing in the employment, but this case, as left to the jury under the particular facts, is not one of them. This engineer was entitled to rely upon the company as having properly constructed the road, and to presume that it had made proper inquiry in respect of latent defects, if there were any, in the construction, for such was its duty, and

be cannot be held to knowledge of the danger lurking in this narrow seam in the mountainside by whose inequalities its sinuosities were hidden" (p. 458).

The **O'Brien case** was heard by the Court of Appeals (49 Fed., l. c. 548), and among other things the Court of Appeals said:

"The training and knowledge of an engineer is not needed to enable one to understand the action of water in rushing down a gully or similar waterway, nor to know if an obstruction like a solid railway roadbed is built across a waterway, down which any considerable amount of water may be expected to pass, that, unless an outlet is given to it, it must of necessity collect against the roadbed, and perchance overflow it. Such facts are matters of common knowledge, gathered from the experience and observation of everyday life, and hence a jury is entirely competent to pass upon an issue involving considerations of that nature."

In the case of **Chesapeake & Ohio Ry. Co. v. Deatley, 241 U. S. 310**, the plaintiff, a head brakeman, had been injured whilst attempting to mount a freight train in motion. The mounting could be made with reasonable safety if the train was running at a moderate rate of speed. There was some risk in so mounting. The train in question was running at the rate of twelve miles an hour, and the claim was that this was an unusually dangerous rate

of speed at which to mount the train, and that the engineer was negligent in running it at that rate, and if the injured party could have discovered that the train was being run at a negligent rate of speed he assumed the risk.

Mr. Justice Pitney stated defendant's position thus:

> "It is insisted that the true test is, not whether the employe did, in fact, know the speed of the train and appreciated the danger, but whether he ought to have known and comprehended; whether, in effect, he ought to have anticipated and taken precautions to discover the danger."

To this he responded:

> "This is inconsistent with the rule repeatedly laid down and uniformly adhered to by this Court. According to our decisions, the settled rule is, not that it is the duty of an employe to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employe may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of car and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them."

In the case of **Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 68**, the jury were instructed that if the deceased em-

ployé either knew of the danger of collision with the water spout, or, by the observance of ordinary care upon his part, ought to have known of it, no recovery could be had. Mr. Justice Day, as to this portion of the charge, said:

> "The charge of the Court upon the assumption of risk was more favorable to the plaintiff in error than the law required, as it exonerated the railroad company from fault if, in the exercise of ordinary care, McDade might have discovered the danger. Upon this question **the true test is not in the exercise of care to discover dangers, but whether the defect is known or plainly observable by the employe.**"

In Oregon Short Line & U. N. Ry Co. v. Tracy, 66 Fed. Rep. 931, a plaintiff, while stationed as a lookout near the front end of cars which were being pushed along a spur track, was thrown forward by a collision with a car standing on the track and injured. Brush overhung the track and obscured the view. Held by the Circuit Court of Appeals (9th Circuit) that it was a question for the jury whether or not plaintiff assumed the risk attendant on such condition of the track, and the Court pointed out the difference in the rule applicable to changing conditions and fixed or permanent conditions and said:

> "But he does not necessarily know, and he cannot be expected to meet, dangers which arise from changes in those conditions, however apparent may be the causes which produce them. He is not presumed to know that the rains and floods will have covered the

track with earth and sand at a place where common prudence would require that provision be made against the occurrence of such an obstruction. He is not required to assume that ice and snow will be allowed negligently to accumulate upon the track and swtiches, or that other obstructions will be placed on or about the same, so as to render the track unsafe, or his work more dangerous than it otherwise would be."

Oregon Short Line & U. N. Ry. Co. v. Tracy, 66 Fed. Rep. 931-935.

Cincinnati N. O. & T. P. Ry. Co. v. Thompson (C. C. A., 6th Cir.), 236 Fed. 1, is a well considered case and, after full and candid discussion, it was held that a brakeman injured when he stepped on a large piece of slag in alighting from a train did not assume the risk of injury as a matter of law, even though he knew smaller pieces of slag may have been at the place where he alighted. The Court in said opinion points out that the doctrine of assumption of risk necessitates an

"immediate knowledge obtained from pure observation. It does not cover conclusions or inferences from such knowledge" (236 Fed. 11).

The decision of the Supreme Court is in strict accord with the numerous decisions of this Court as to assumption of risk, and also in accord with the decisions of other courts whose pronouncements are entitled to great weight. We refer to a few typical cases from other jurisdictions.

In **Bowen v. Worumbo Mfg. Co., 105 Me. 31, 72 Atl. 685,** plaintiff had been an employe of defendant for sixteen months. Ice formed on a stairway over which plaintiff was required to pass, due to the melting of snow on the roof. The ice was covered with snow. Plaintiff knew that ice had previously formed on the steps. Plaintiff slipped and fell while leaving the premises at noon. In holding there was no assumption of risk as a matter of law the Court said:

> "It is insisted, however, by the defendant, that the plaintiff must have known of the danger, and that in attempting to descend the stairs in that condition she voluntarily assumed the risk of so doing. But it is settled law that a general knowledge of a danger, without an appreciation of it, is not conclusive upon the question of the assumption of risk (Frye v. Bath Gas & Elec. Co., 94 Me. 17, 46 Atl. 804). And in the case at bar it has been noted that the duty of the defendant, prior to the accident, had frequently been performed by cutting and removing the ice from the stairway, and that thus its condition necessarily changed from time to time. When, therefore, this fact is considered with the testimony of the plaintiff that she did not see any ice there before she fell, and the absence of any direct evidence that she knew that there was ice concealed under the snow on the steps at that time, **it cannot be said as a matter of law that she understood and appreciated the dangerous condition of the stairs,** and hence voluntarily assumed the risk of attempting to use them."

To this same effect is the decision of the Massachusetts Court in Fitzgerald v. Conn. River Paper Co., 155 Mass., l. c. 162, 29 N. E. 467, 31 Am. St. Rep. 537, a case in which the facts were analogous to those at bar, but more favorable to the defendant. In the opinion the Court say:

> "We are of opinion that it cannot be said, as a matter of law, that the plaintiff in the present case, in attempting to go down the steps voluntarily, assumed a risk which she understood and appreciated which resulted in the accident. She knew that the steps were icy, and that there was some danger in passing over them; but the evidence tended to show that this slipperiness was constantly changing in different states of the weather, with the spray falling daily from the steam pipe and freezing upon them. Common experience tells us that the degree of slipperiness of ice is not always determinable from an ocular inspection of it. (See, also, Osborne v. London & North Western Railway, 21 Q. B. D. 220, a case precisely in point.)"

In Rogers v. Davis, 228 Pac. Rep., l. c. 332, a case under the Federal Act, where a brakeman slipped on an accumulation of snow, ice, dirt and debris between the company's track, the Court said:

> "Something is said in appellant's brief about assumption of risk. Under the evidence it cannot be contended that the deceased assumed the risk incident to the accumulation of ice in question (Union

Pacific Ry. Co. v. O'Brien, 161 U. S. 451, 16 Sup. Ct. 618, 40 L. Ed. 766).

"'A risk arising from the master's failure to provide a reasonably safe place and machinery is not an ordinary risk, but an extraordinary one, and is not assumed by the servant unless it is clearly shown that he both knew the facts out of which the risk arose **and appreciated the danger'** (Bressan v. Herrick, 35 Idaho 217, 205 Pac. 555).

"It cannot be said, as a matter of law, that the evidence clearly shows deceased knew about the ridge of ice and appreciated the danger."

In Burdick v. Chicago & N. W. Ry. Co., 123 Minn. 105, 143 N. W., l. c. 116, 117, a suit under the Federal Act, where a brakeman was injured by his feet catching in a snowdrift, the Court said:

"Passing the question whether the defense of assumption of risk is open under the Federal Act in a case like this, with the remark that if it is it comes near nullifying the provision of the act removing contributory negligence as a defense, we have no difficulty in holding that in the case at bar the question of assumption of risk was for the jury. **Plaintiff, while he could have seen the drift had he looked that way, did not, in fact, see it. And he did not know that the snow at that point was packed and crusted.** He had not before switched in this yard in the daytime. We are unable to hold, as a matter of law, that he ought to have known and appreciated the danger."

IV.

There was ample evidence of sufficient facts to establish defendant's actionable negligence, and the Supreme Court of Missouri did not err in so holding.

The opinion of the Supreme Court of Missouri responded to the contention that the evidence was insufficient and answered it so fully and completely that we adopt the language that Court used in disposing of that contention as our argument. It seems absolutely sound, and is as follows:

> "1. It is insisted that the petition does not state facts sufficient to constitute a cause of action, because it fails to allege that the defendant either knew, or by the exercise of ordinary care could have known, of the alleged negligent conditions, or that they had existed for a sufficient length of time to enable defendant, by the exercise of ordinary care, to have discovered and remedied them.
>
> "The petition alleges that at the time of plaintiff's injury, and for a long time prior thereto, the surface of the platform was composed of chat and fine gravel so loosely put together that depressions, holes or drains were formed in it; that the platform and station were so negligently constructed that the platform sloped towards the door of the station and the station had no gutters on the eaves of its roof; that a depression formed in front of the door to the station; that the chat or gravel was carried away from in front of said door by persons passing in and out of the

station and the water falling on the station and on the platform flowed towards this depression, forming a ditch, and that in cold weather, when rain, snow and sleet fell, ice formed in this ditch and depression, and formed a slick, ice-covered and irregular surface, rendering it unsafe and dangerous for a person to step into or upon; that when plaintiff slipped and fell, the depot platform was dark and unlighted and that she had no knowledge that said platform was in said dangerous and unsafe condition, nor could she have knowledge of such fact by the exercise of ordinary care, etc.

"'Where it appears from the complaint that the defect is a defect of construction, the authorities do not require an allegation of the employer's knowledge of the defect'" (6 Thompson's Comm. on the aw of Negligence [2nd Ed.] 533).

"'Where the defect in an appliance is shown to be structural and of such a character as renders it unsafe it may be inferred that the employer was aware of the defect and an employe who has been injured by such an appliance need not show that the master knew it was defective'" (26 Cyc 1144, and cases cited in note 86).

"In Dietzman v. St. Louis Screw Company, 300 Mo. 196, 210, 254 S. W. 59, Judge Graves said:

"'Nor is there question as to the fact that defendant knew of the situation in ample time to have remedied it before the accident. In fact, it constructed the place, and, when it made it a working place, was bound to know its condition.'

"Elliott v. Payne, 293 Mo. 581, 239 S. W. 851, was an action based on the Federal Employers' Liability Act for the death of a locomotive fireman charged to

have been caused by a defective platform. Judge Graves said:

"'Plaintiff had evidence tending to show that at places the bricks were lower than the curbing, and this condition permitted the accumulation of water and ice. Whether the defects were in the original construction or appeared later by reason of use and the sinking of the bricks into the base upon which they were placed can make no material difference. The charge in the petition is that the defendant maintained the platform in a defective condition.'

"In Sankey v. Chicago etc. Ry. Co., 118 Iowa 39, 91 N. W., l. c. 821, the Court said:

"'It is first urged that defendant cannot be held negligent because of the presence or accumulation of ice and snow upon its tracks and yards. Within certain limitations, this is the correct doctrine. Climatic conditions—heat, sold, rain, snow and ice—are beyond the control of the employer, and the mere fact of their existence or occurrence does not tend to negative the exercise of reasonable care. But it does not follow that a case cannot arise where the presence or existence of some of these elements is so combined with want of reasonable care by a railroad company in the maintenance of its tracks and yards as to create a danger which is not naturally or necessarily incident to a brakeman's labor. The work of coupling and uncoupling cars, making up trains, taking and discharging freight, opening and closing switches is done almost exclusively within the yard limits of the stations along the line of road, and within reasonable limits, the obligation of the master to furnish his servant a safe place in which to work applies to these

yards as imperatively as to the repair shops or to the general offices of the company.'

"See, also, Gibson v. Railroad, 115 Minn. 147, 131 N. W. 1057; Keitel v. St. Louis Cable Company, 28 Mo. App. 657, and Combs v. City of Kirksville, 134 Mo. App. 645, 114 S. W. 1153.

"Reasonable and ordinary care must be determined in the light of the dangers to be reasonably anticipated. The defendant must be presumed to know that many persons would pass over this platform and that holes or depressions would form in the loose chat or broken pieces of stone of which it was formed, particularly in front of the door to the waiting room; that rain would fill such holes with pools of water; that in the winter season these pools of water would freeze and were likely to be covered with snow and become unsafe for persons walking on the platform. In the exercise of ordinary care the defendant was bound to anticipate and make reasonable provisions for such contingencies, 'for what a man knows and should know are equivalent in law' (Benton v. St. Louis, 248 Mo. 98, 109, 154 S. W. 473; Schiller v. Kansas City Breweries Company, 156 Mo. App. 569, 577, 137 S. W. 607; Johnson v. Railroad, 164 Mo. App. 600, 622, 147 S. W. 529; Bowen v. Ry. Co., 95 Mo. 268, 275, 8 S. W. 230; Beane v. City of St. Joseph [Mo.], 256 S. W. 1093, 1095; Merritt v. Telephone Co., 215 Mo. 299, 310, 115 S. W. 19; Smith v. City of St. Joseph, 42 Mo. App. 392, 398; Heether v. Huntsville, 121 Mo. App. 495, 499, 97 S. W. 239; 3 La Batt, Master and Servant [2nd Ed.] 2750). The contention is devoid of merit."

From a consideration of the facts in this record we submit the finding of the Supreme Court of Missouri is

well supported and applies well-settled principles of law universally adhered to by this Court.

V.

The sole cause of plaintiff's injuries was not plaintiff's contributory negligence.

The recitals set forth in the discussion of the two previous points refer to and set forth the negligence proved and charged against this defendant. That it was actionable negligence is demonstrated. That the plaintiff was not guilty of contributory negligence in the sense that it was the **sole** cause of the accident also clearly appears from a consideration of said facts. If she was guilty of contributory negligence which **fell short of being the sole cause** of the accident she has been penalized for that by instruction No. 5 given for the defendant, directing the jury to make a corresponding reduction in the amount of her recovery.

The degrees of care required of the master and servant differ and the degree of care imposed by law upon the master is greater than that imposed upon a servant. As said by Judge Sanborn in **Union Pac. Ry. Co. v. Jarvi, 53 Fed. 69**, the master is required to use care in the preparation and subsequent inspection and

> "the circumstances in which the master is placed are generally so widely different from those surrounding the servant, and the primary duty of using care to

furnish a reasonably safe place for others is so much higher than the duty of the servant to use reasonable care to protect himself in a case where the primary duty of providing a safe place or safe machinery rests on the master, that a reasonably prudent person would ordinarily use a higher degree of care to keep the place of work reasonably safe if placed in the position of the master who furnishes it than if placed in that of the servant who occupies it."

As said in Labatt's Master & Servant, Vol. 4, 2nd Ed., p. 3792:

"The decisions also show that the courts do not consider it justifiable to impute knowledge to a servant, as a matter of law, on the ground that his means or opportunities of knowledge were equal or superior to those of the master, unless the risk to which the injury was traceable belonged to the class to which the description 'obvious,' 'visible,' 'manifest,' etc., is applicable."

We respectfully submit that the judgment of the Supreme Court should not be disturbed.

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